

No. 15046

United States
Court of Appeals
for the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	13
Certificate of Clerk to Record on Appeal	50
Complaint	5
Counsel, Names and Addresses of	1
Docket Entries, Excerpt From	3
Findings of Fact and Conclusions of Law	44
Judgment	48
Memorandum Opinion	37
Notice of Appeal	49
Statement of Points on Appeal	52
Stipulation of Facts	17
Ex. No. 5—Letter to Executors of the Estate by the Commissioner	29
Ex. No. 6—Letter Re the Estate of Walter D. K. Gibson, Dated June 6, 1945	31
Stipulation of Facts, Supplemental	33



NAMES AND ADDRESSES OF COUNSEL

MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
Crocker Building,
San Francisco, California,
Counsel for Wells Fargo Bank.

CHARLES K. RICE,
Acting Assistant United States Attorney
General;

LEE A. JACKSON,
Attorney Department of Justice,
Washington, 25, D. C.;

LLOYD H. BURKE,
United States Attorney;

CHARLES ELMER COLLETT,
Assistant United States Attorney,
Post Office Building,
San Francisco, California;
Counsel for United States of America.



In the United States District Court for the Northern
District of California, Southern Division

No. 31436—Civil

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of WALTER K. D. GIB-
SON, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

EXCERPT FROM DOCKET ENTRIES

1952

Apr. 11—Filed complaint & issued summons.

Oct. 23—Filed answer of defendant.

1954

Dec. 29—Filed interrogatories by United States to
Plaintiff.

1955

Jan. 13—Filed answer of plaintiff to interrogatories
by United States.

June 2—Filed stipulation of facts.

June 6—Filed supplemental stipulation of facts.

June 7—Court trial. Evidence introduced, argu-
ments heard, motion of defendant to file
counterclaim submitted. Memos ordered
filed 30-30-15 days and case continued to
Aug. 22, 1955, for submission. (Judge
Harris)

- June 7—Filed jurisdictional statement and statement of facts by plaintiff.
- Sept. 23—Filed memo opinion of Court (motion of defendant to file counterclaim denied. Findings, conclusions and judgment to be prepared by counsel.) (Judge Harris)
- Nov. 23—Filed findings of fact and conclusions of law. (Judge Harris)
- Nov. 25—Entered judgment—filed Nov. 23, 1955—complaint dismissed and counterclaim of defendant denied.
- Nov. 25—Mailed notices.

1956

- Jan. 20—Filed notice of appeal by defendant.
- Jan. 23—Filed notice of appeal by plaintiff.
- Jan. 23—Filed appeal bond in sum \$250.00.
- Feb. 17—Filed appellant's designation of record on appeal (Wells Fargo).

In the United States District Court, for the Northern
District of California, Southern Division

No. 31436

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT TO RECOVER TAXES
ILLEGALLY COLLECTED

Comes now the plaintiff above named and for
cause of action against the defendant herein alleges
as follows:

I.

Walter D. K. Gibson was a citizen of the United States and a resident of the City and County of San Francisco, State of California, and died on December 21, 1938. Thereafter such proceedings were duly taken and had in and by the Superior Court of the State of California in and for the City and County of San Francisco in the matter of the Estate of Walter D. K. Gibson, Deceased, that by an order and judgment of said Court duly given and made on January 11, 1939, the will of said Walter D. K. Gibson, Deceased, was admitted to probate, and Emily A. Gibson and Wells Fargo Bank & Union Trust Co., named therein as such, were duly appointed the ex-

ecutors thereof and thereafter duly qualified as such executors, and on said date Letters Testamentary upon the will of said deceased were duly issued to them. Thereafter Wells Fargo Bank & Union Trust Co. and Emily A. Gibson were the duly appointed, qualified and acting co-executors of the will and estate of Walter D. K. Gibson, Deceased, until November 24, 1941, on which date Emily A. Gibson died and ever since said latter date Wells Fargo Bank & Union Trust Co. has been and now is the sole surviving executor of the will and estate of Walter D. K. Gibson, Deceased. Said estate was in the course of administration from January 11, 1939, to and including August 26, 1941, on which latter date said estate was finally distributed in accordance with the order of said Court duly given and made on said day and entitled "Decree Settling First and Final and Supplementary Account of Executors and of Final Distribution," but plaintiff herein was nevertheless not discharged as said executor. Said estate was composed entirely of community property in which during the continuance of the married relation decedent and his spouse had present, existing and equal interests.

II.

Clifford C. Anglim was the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of California during all times herein mentioned prior to June 1, 1942, but ever since said date has not been and is not now in office as Collector of Internal Revenue of the United States. Richard Nickell was the acting Col-

lector of Internal Revenue of the United States for the First District of California during the period beginning June 1, 1942, and ending December 31, 1942, and was likewise said acting Collector during the period beginning April 1, 1945, and ending May 13, 1945, but during the interim between said periods and subsequent to said last date has not been and is not now in office as acting Collector of Internal Revenue of the United States. James G. Smyth was the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of California at all times mentioned herein on and after May 14, 1945.

III.

On or about March 15, 1942, plaintiff, as said sole surviving executor, filed with said Clifford C. Anglim, as Collector of Internal Revenue, a Federal fiduciary income tax return for said estate for the year 1941 on Form 1041 furnished by the Commissioner of Internal Revenue of the United States for that purpose. Said return showed an income tax due from said estate for said year in the amount of Three Thousand Eight Hundred Fifteen and 44/100 Dollars (\$3,815.44), of which amount Nine Hundred Fifty-three and 86/100 Dollars (\$953.86) was paid by plaintiff, as said executor, to said Clifford C. Anglim, as Collector of Internal Revenue, on March 16, 1942. Thereafter and on June 10, 1942, the remaining portion of said tax in the sum of Two Thousand Eight Hundred Sixty-one and 58/100 Dollars (\$2,861.58) was paid by plaintiff, as said ex-

ecutor, to said Richard Nickell, as acting Collector of Internal Revenue.

IV.

In a report dated November 6, 1944, the Internal Revenue Agent in Charge at San Francisco proposed that an additional income tax in the sum of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19) be assessed against said estate for the period beginning January 1, 1941, and ending August 26, 1941. Said report proposed adjustments, the net effect of which was to increase the taxable net income reported on said income tax return from the sum of Seventeen Thousand Sixty-six and 35/100 Dollars (\$17,066.35) to the sum of Thirty-five Thousand Seven Hundred Fifty-seven and 94/100 Dollars (\$35,757.94). Said adjustments comprised an additional deduction in the sum of Nine Hundred Ninety-nine and 6/100 Dollars (\$999.06) and an addition to income in the sum of Nineteen Thousand Six Hundred Ninety and 65/100 Dollars (\$19,690.65). Said latter adjustment was based upon the determination of said Internal Revenue Agent that all the income for the period January 1, 1941, to and including August 26, 1941, attributable to the community property owned by said Walter D. K. Gibson, Deceased, and his surviving spouse, Emily A. Gibson, must be reported for income tax purposes by said estate and not one-half thereof because none of said income was distributable to said spouse during said period.

V.

Thereafter said James G. Smyth, as Collector of Internal Revenue, made demand on plaintiff, as said executor, for payment of said additional tax in the amount of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19), together with interest thereon in the sum of One Thousand Five Hundred Forty-six and 23/100 Dollars (\$1,546.23), or a total payment of Ten Thousand Seven Hundred Seven and 42/100 Dollars (\$10,707.42). On July 11, 1945, said demand was partially satisfied by payments made to said Collector in the total sum of Ten Thousand Six Hundred Ninety-two and 22/100 Dollars (\$10,692.22), leaving an unpaid portion of said demand in the amount of Fifteen and 20/100 Dollars (\$15.20). On January 17, 1947, the entire amount of said unpaid portion was paid to said Collector, together with interest thereon in the amount of One and 40/100 (\$1.40), making a total payment of Sixteen and 60/100 Dollars (\$16.60).

VI.

On or about June 30, 1947, plaintiff, as said executor, filed with the Collector of Internal Revenue of the United States for the First District of California a claim for refund of income taxes illegally collected from plaintiff for the year 1941 in the sum of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19) upon Form 843 provided for this purpose by the Commissioner of Internal Revenue of the United States. Said refund claim was based upon the following two grounds: First,

that the determination set forth in said report dated November 6, 1944, of the Internal Revenue Agent in Charge at San Francisco was erroneous in holding that during the year 1941 none of the income attributable to the community property owned by said Walter D. K. Gibson, Deceased, and his surviving spouse, Emily A. Gibson, was distributable to the said Emily A. Gibson during the period beginning January 1, 1941, and ending August 26, 1941, and therefore deductible by said estate in the determination of taxable net income. Second, that the income attributable to the widow's community interest during said period was taxable to her and not to said estate. Said refund claim stated that the correct tax liability of the estate of Walter D. K. Gibson, Deceased, for the calendar year 1941 was Three Thousand Eight Hundred Fifteen and 44/100 Dollars (\$3,815.44) and that there had been an overpayment of income taxes for said calendar year in the sum of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19), refund of which with interest was requested. A copy of said claim for refund of taxes illegally collected is attached hereto and marked "Exhibit A" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

VII.

On or about April 12, 1950, plaintiff received a certificate of overassessment issued by the Commissioner of Internal Revenue of the United States in

which he certified an overassessment of income tax of plaintiff as said executor for the year 1941 in the sum of Nine Thousand Three Hundred Sixty-two and 58/100 Dollars (\$9,362.58) but said overassessment was reduced by the sum of Two Hundred One and 39/100 Dollars (\$201.39), which amount was barred by the statute of limitations, and said overassessment was further reduced by the sum of Seven Thousand One Hundred and 35/100 Dollars (\$7,100.35) which said Commissioner alleged to be due from the estate of Emily A. Gibson, Deceased. The net overassessment allowed by said certificate was in the sum of Two Thousand Sixty and 84/100 Dollars (\$2,060.84), together with interest thereon in the sum of Three Hundred Forty-seven and 83/100 Dollars (\$347.83). A copy of said certificate of overassessment is attached hereto and marked "Exhibit B" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

VIII.

On April 13, 1950, the Commissioner of Internal Revenue of the United States, in accordance with section 3772(a)(2) of the Internal Revenue Code, duly notified plaintiff by registered mail that the claim for refund of plaintiff as said executor for the year 1941 in the amount of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19) was disallowed to the extent not previously allowed by said certificate of overassessment. Said Commis-

sioner thereby disallowed plaintiff's claim for refund to the extent of Seven Thousand Three Hundred One and 74/100 Dollars (\$7,301.74). A copy of said notice of partial disallowance is attached hereto and marked "Exhibit C" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

IX.

Plaintiff alleges that the entire amount of income received by it as executor of the estate of Walter D. K. Gibson, Deceased, during the period beginning January 1, 1941, and ending August 26, 1941, and which was attributable to said Emily A. Gibson's community interest in property held by plaintiff as said executor was either: (a) not taxable income of said estate, or (b) if includible as income of said estate, was deductible as income distributable to and taxable to said Emily A. Gibson and not to plaintiff as said executor. Plaintiff further alleges that said Commissioner of Internal Revenue erroneously disallowed plaintiff's refund claim for the year 1941 to the extent of Seven Thousand One Hundred and 35/100 Dollars (\$7,100.35).

Wherefore, plaintiff prays judgment against the defendant herein for that portion of plaintiff's claim for refund disallowed by said Commissioner of Internal Revenue, to wit, the sum of at least Seven Thousand One Hundred and 35/100 Dollars (\$7,100.35), together with interest thereon as by

law provided and for his costs in this behalf sustained.

/s/ LEON de FREMERY,

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

MORRISON, HOHFELD, FOERSTER, SHU-
MAN & CLARK,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed April 11, 1952.

[Title of District Court and Cause.]

ANSWER

The defendant, by and through Chauncey Tramutolo, United States Attorney in and for the Northern District of California, for answer to the complaint filed herein alleges:

I.

Defendant admits the allegations contained in paragraph I, except that it denies the allegations contained in the last sentence of paragraph I.

II.

Defendant admits the allegations contained in paragraph II.

III.

Defendant admits the allegations contained in paragraph III.

IV.

Defendant admits the allegations contained in paragraph IV, except that it denies that any income of the estate of Walter Gibson for the period beginning January 1, 1941, through and including August 26, 1941, was attributable to community property owned by said Walter Gibson and his surviving spouse, Emily Gibson.

V.

Defendant admits the allegations contained in the first sentence of paragraph V. Defendant denies the other allegations contained in paragraph V except that it admits that plaintiff paid to said Collector an amount of \$2,160.32 on July 11, 1945, and an amount of \$15.20 on January 20, 1947.

VI.

Defendant admits that on or about June 30, 1947, plaintiff as executor of the will of Walter Gibson, deceased, filed with the Collector of Internal Revenue of the United States for the First District of California a claim for refund of income taxes for the year 1941 in the sum of \$9,161.19. Defendant denies that any income taxes were illegally collected from plaintiff for the year 1941 and further denies any allegations made in said claim for refund not herein specifically admitted.

VII.

Defendant admits the allegations contained in paragraph VII. Defendant alleges, however, that

said Certificate of Overassessment was issued in error for the reason that all of the income of the estate of Walter Gibson, deceased, for the period beginning January 1, 1941, and ending August 26, 1941, was taxable to the estate of Walter Gibson and no overassessment had, in fact, been made.

VIII.

Defendant admits the allegations contained in paragraph VIII.

IX.

Defendant denies the allegations contained in paragraph IX.

Alternative Defense

For an alternative defense to the complaint filed herein, defendant alleges:

I.

As a result of the report dated November 6, 1944, described in paragraph IV of the complaint, there was excluded by the Commissioner of Internal Revenue from the income reported by the estate of Emily A. Gibson in a fiduciary income tax return for the period beginning January 1, 1941, and ending November 24, 1941, one-half of the income of the estate of Walter Gibson which had been reported as taxable income by the estate of Emily A. Gibson. Said exclusion resulted in a determination of over-assessment in favor of the estate of Emily Gibson in the amount of \$7,359.84.

II.

The collection of the deficiency assessed against the estate of Walter Gibson, deceased, as described in paragraphs IV and V of the complaint was limited to the amount by which said deficiency exceeded the overassessment in favor of the estate of Emily Gibson.

III.

If the allegations contained in paragraphs I and IX are correct the tax owing to the defendant on the income distributable to Emily Gibson from the estate of Walter Gibson for the period beginning January 1, 1941, and ending November 24, 1941, was \$7,100.35.

IV.

If one-half the income of the estate of Walter Gibson was distributable to and taxable to Emily Gibson, the taxes on said income, owed by the estate of Emily Gibson, are equal to the amount claimed in this action. The assessment and/or collection of said taxes against the estate of Emily Gibson are now barred by the statute of limitations. Any recovery by plaintiff in this action will inure to the sole benefit of the distributees of the estate of Emily Gibson and said income will not be taxed.

V.

Defendant's right to retain said amount of \$7,100.35 is superior to any right asserted by the defendant.

Wherefore, having fully answered, defendant

prays that the complaint be dismissed at plaintiff's costs.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

[Endorsed]: Filed October 23, 1952.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true upon the trial of the above-entitled case, provided, however, that this stipulation shall be without prejudice to the right of any of the parties to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The exhibits attached to the complaint in this proceeding and the exhibits attached to this stipulation are full, true and correct copies of the respective documents or portions thereof from which they were copied and all of said exhibits are hereby referred to and by such reference are made a part of this stipulation as fully and to the same extent as if they were set out at large herein.

2. Plaintiff is the executor of the will of Walter D. K. Gibson, deceased, who died on December 21, 1938. Walter D. K. Gibson is hereinafter referred to as the "decedent." The estate of Walter D. K.

Gibson, deceased (hereinafter referred to as "Walter's Estate"), was in the course of administration from January 11, 1939, to August 26, 1941, on which latter date it was distributed in accordance with a decree of final distribution, but plaintiff herein was nevertheless not discharged as said executor. The pertinent portions of decedent's will executed on August 31, 1937, are attached hereto and marked Exhibit 1. A copy of the election agreement to take under decedent's will executed on August 31, 1937, by decedent's wife, Emily A. Gibson (hereinafter referred to as "decedent's wife"), is attached hereto and marked Exhibit 2. A copy of the pertinent portions of the decree of final distribution of Walter's Estate is attached hereto and marked Exhibit 3.

3. Under the power given to decedent's wife by decedent's will, decedent's wife withdrew on May 8, 1941, fifty per cent of Walter's Estate (other than property distributed in the form of small bequests which may be disregarded in this proceeding), and assigned those properties to the Crocker First National Bank of San Francisco to hold as trustee under a trust agreement. The property so assigned was distributed to said Crocker First National Bank as trustee under the decree of final distribution of Walter's Estate. The pertinent portions of the trust agreement are attached hereto and marked Exhibit 4.

4. At the date of death all of the property owned by decedent and all of the property owned by de-

cedent's wife was community property in which during the continuance of the marriage relation decedent and decedent's wife had present, existing and equal interests. Walter's Estate was composed entirely of the property referred to in the foregoing portion of this paragraph 4 and said estate was distributed in accordance with the provisions of decedent's will.

5. Included in the gross income reported on the 1941 fiduciary income tax return filed on behalf of Walter's Estate was \$19,690.65, representing one-half of the income attributable to the property subject to administration in Walter's Estate for the period January 1, 1941, to August 26, 1941. The return showed an income tax of \$3,815.44 due from said estate, which tax was paid in full on or before June 10, 1942.

6. The other half of the income for said period attributable to said property subject to administration in Walter's Estate, namely, \$19,690.65, was reported on the last income tax return filed for decedent's wife, which return was for the period beginning January 1, 1941, and ending November 24, 1941, on which latter date decedent's wife died. Said return was filed on or before March 15, 1942. The taxpayer for said period is hereinafter referred to as "Emily A. Gibson, deceased."

7. In a report dated November 6, 1944, the Internal Revenue Agent in Charge at San Francisco proposed that an additional income tax for 1941 in the sum of \$9,161.19 be assessed against Walter's

Estate. The net effect of the adjustments proposed in said agent's report was to increase the taxable net income reported on the return from \$17,066.35 to \$35,757.94. The adjustments comprised an additional deduction of \$999.06 and an addition to income of \$19,690.65. The latter adjustment was based upon the determination of the Revenue Agent that all the income for the period January 1, 1941, to August 26, 1941, attributable to said property subject to administration in Walter's Estate should have been reported for income tax purposes by said estate, and not one-half thereof, for the reason that none of said income was distributable to decedent's wife during such period.

8. Concurrently with the Revenue Agent's determination issued on or about November 6, 1944, that all the income for the period January 1, 1941, to August 26, 1941, attributable to the property subject to administration in Walter's Estate should have been reported for income tax purposes as income of Walter's Estate, said Revenue Agent issued a correlative thirty-day letter advising Emily A. Gibson, deceased, care of Wells Fargo Bank & Union Trust Co., that there had been an overassessment of income taxes due from Emily A. Gibson, deceased, for the period January 1, 1941, to November 24, 1941. One of the adjustments proposed in said letter was a reduction of income in the sum of \$19,690.65, which amount was one-half of the income attributable to said property subject to administration in Walter's Estate which, as noted

hereinabove, had been included as gross income in the last income tax return of Emily A. Gibson, deceased.

9. On January 22, 1945, the Commissioner of Internal Revenue (hereinafter referred to as the "Commissioner") wrote the executors of the Estate of Emily A. Gibson, deceased (hereinafter referred to as "Emily's Estate"), relative to the overassessment due Emily A. Gibson, deceased, referred to in paragraph 8 hereinabove. A copy of said letter is attached hereto and marked Exhibit 5. Attached hereto and marked Exhibit 6 is a copy of a letter dated June 6, 1945, from the attorneys for said executors and addressed to plaintiff.

10. The executors of Emily's Estate (Walter D. K. Gibson, Jr., and Grace Collins) were subsequently advised that a certificate of overassessment in the sum of \$7,359.84 had been prepared for taxpayer Emily A. Gibson, deceased, for the period January 1, 1941, to November 24, 1941. In said thirty-day letter issued on November 6, 1944, and referred to in paragraph 8 hereinabove, said executors had been advised to file a claim for refund of the proposed overassessment in the amount of \$7,359.84 and on March 7, 1945, said executors filed such a claim. On June 6, 1945, said executors authorized the Commissioner to credit said overassessment due Emily A. Gibson, deceased, against the deficiency of \$9,161.19 due from Walter's Estate. Said authorization was delivered to the executor of Walter's Estate along with said letter of June 6,

1945, addressed to plaintiff and attached hereto as Exhibit 6.

11. The subsequent demand for payment of the additional tax due from Walter's Estate in the amount of \$9,161.19 together with interest thereon of \$1,547.63, in the total sum of \$10,708.82, was satisfied in full as follows:

Deficiency plus interest		\$10,708.82
(a) July 11, 1945, by cash	\$ 2,160.32	
(b) July 11, 1945, credit of over-assessment due Emily A. Gibson, deceased	7,359.84	
(c) July 11, 1945, credit of interest on overassessment due Emily A. Gibson, deceased	1,172.06	10,692.22
		<hr/>
Balance owing	\$	15.20
Interest on balance		1.40
		<hr/>
		\$ 16.60
(d) January 17, 1947, by cash	\$	16.60
		<hr/> <hr/>

12. The tax deficiency, plus interest, assessed against Walter's Estate in the total sum of \$10,708.82, was chargeable to the beneficiaries or transferees of beneficiaries under the will of decedent as follows:

50% thereof to Crocker First National Bank of San Francisco, as transferee of decedent's wife who established a trust with said bank as trustee as referred to in paragraph 3 hereinabove.

12½% to Walter D. K. Gibson, Jr.

121½% to the Joanne Gibson trust.

25% to the Grace G. Collins trust.

Walter's Estate reimbursed the executors of Emily's Estate on July 11, 1945, for the use of the overassessment of \$7,359.84 of income taxes due from Emily A. Gibson, deceased, for the period January 1 to November 24, 1941, together with interest thereon in the sum of \$1,172.06. The amount of such reimbursement to the executors of decedent's wife was distributable under the terms of her will as follows:

50% to Walter D. K. Gibson, Jr., and

50% to Grace G. Collins.

There was finally distributed to Walter D. K. Gibson, Jr., and Grace G. Collins as residuary legatees under the will of decedent's wife the sum of \$9,717.50 to each.

13. On or about June 30, 1947, plaintiff as said executor filed a claim for refund of said additional tax. A copy of said refund claim is attached to the complaint filed herein and marked Exhibit A thereof.

14. In a letter dated April 8, 1948, the Internal Revenue Agent in Charge at San Francisco advised Walter's Estate that an examination had been made by a representative of that office concerning the income tax liability of said estate for the taxable year ended December 31, 1941, in connection with said estate's claim for refund in the amount of

\$9,161.19. A copy of said letter, together with the report attached thereto, is attached hereto and marked Exhibit 7.

15. On or about April 12, 1950, plaintiff received a certificate of overassessment which certified that the income tax of Walter's Estate for the year 1941 had been overassessed in the sum of \$9,362.58, but that such overassessment was reduced by the sum of \$201.39, which amount was barred by the statute of limitations, leaving a balance of \$9,161.19, the amount claimed in the aforesaid refund claim. However, such overassessment was further reduced by the sum of \$7,100.35, which sum was the amount of a proposed deficiency in tax due from Emily A. Gibson, deceased. The net overassessment allowed by said certificate was \$2,060.84, together with interest thereon of \$347.83, or a total sum of \$2,408.67. On or about April 12, 1950, the executor of Walter's Estate received a check in full payment of said net overassessment. A copy of said certificate of overassessment is attached to the complaint filed herein and marked Exhibit B thereof.

16. On April 13, 1950, the Commissioner notified plaintiff by registered mail that the claim for refund was disallowed to the extent not previously allowed by the certificate of overassessment. The Commissioner thereby disallowed the claim for refund to the extent of \$7,301.74 (overassessment of \$9,362.58 less \$2,060.84 allowed). A copy of the notice of partial disallowance is attached to the

complaint filed herein and marked Exhibit C thereof.

17. In a thirty-day letter dated January 25, 1949, taxpayer Emily A. Gibson, deceased, care of Wells Fargo Bank & Union Trust Co., was advised that a deficiency in income taxes for the period ended November 24, 1941, had been proposed in the amount of \$7,100.35. Said thirty-day letter stated, "For explanation of adjustments made herein reference is made to the report of the Estate of Walter D. K. Gibson, deceased." The report thus referred to is Exhibit 7 attached hereto. Said proposed deficiency was due to the determination by the Revenue Agent that the one-half share of Emily A. Gibson in the income received by the executor of Walter's Estate during said period was taxable to Emily A. Gibson, deceased. The difference between the amounts of said proposed deficiency (\$7,100.35) and the afore-said overassessment (\$7,359.84) is due chiefly to adjustments correcting an understatement of capital loss and an overstatement of trust income.

18. Taxpayer Emily A. Gibson, deceased, protested said proposed deficiency on the ground that the statute of limitations had expired and that section 3801 of the Internal Revenue Code of 1939 providing an extended statute in regard to related taxpayers did not apply. Thereafter the Internal Revenue Agent in Charge at San Francisco made the following conclusions:

"That the report of the examining officer be modified to reflect no deficiency at this time

pending the obtaining of a final determination of the income tax liability of the Estate of Walter D. K. Gibson, Deceased, for the year 1941.”

19. No statutory notice of deficiency has ever been issued by the Commissioner against Emily A. Gibson, deceased, or Emily’s Estate for the amount of \$7,100.35 to which defendant alleges its rights are superior to those of plaintiff.

20. Emily’s Estate was distributed in accordance with a decree of final distribution entered on January 23, 1947. According to the inventory and final accounting rendered in the probate of Emily’s Estate, there were total assets and receipts of \$75,076.26 and total disbursements other than payment of legacies of \$39,141.14. As the residuary legatees of Emily’s Estate, Walter D. K. Gibson, Jr., received cash and assets valued at \$9,717.50 and Grace Collins received cash and assets valued at \$9,717.50.

21. If the judgment prayed for herein is granted, the refund thereby payable to plaintiff will be distributed in accordance with paragraphs 9 and 12 of the decree of final distribution of Walter’s Estate dated August 26, 1941, Exhibit 3 attached hereto.

22. In summary form, a distribution according to the terms of said paragraph 9 would be apportioned as follows:

(a) One-fourth outright to Walter D. K. Gibson, Jr.

(b) One-fourth in trust to Joanne Gibson, the granddaughter of decedent, net income payable to her annually. The trust to terminate and the corpus to be paid over to her when she reaches thirty years of age (February 23, 1959.) If Joanne Gibson fails to attain such age, and Walter D. K. Gibson, Jr., survives her, corpus over to him free of trust on her death. If Joanne Gibson should not reach thirty years of age, and Walter D. K. Gibson, Jr., predeceases her, corpus over to Grace Collins on the death of Joanne Gibson. In such event, the trust described in subdivision (c) below shall also terminate on Joanne Gibson's death, and the corpus shall be paid over to Grace Collins free of trust.

(c) One-half in trust to Grace Collins, net income payable to her during her lifetime. Upon her death, one-half of the corpus of said trust over to Walter D. K. Gibson, Jr., free of trust, and the remaining one-half of said corpus shall become, if Joanne Gibson be then living, part of the trust described in subdivision (b) above, or shall go to Joanne Gibson free of trust, as the case may be, according to the terms of subdivision (b) above. If Grace Collins becomes a widow at any time, the trust described in this subdivision (c) to terminate and the corpus to be paid over to her free of trust. Grace Collins has the power to invade the corpus to the extent of \$5,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

23. It is agreed by and between the parties hereto that plaintiff's answers to interrogatories propounded by defendant filed January 13, 1955, may be utilized by the plaintiff as well as the defendant as evidence in this proceeding.

24. It is agreed by and between the parties hereto that the amount of tax in dispute exclusive of interest is \$7,100.35.

Dated: May 23, 1955.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER, HOLLOWAY, SHU-
MAN & CLARK,

Attorneys for Plaintiff.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for
Defendant.

EXHIBIT No. 5

Treasury Department
Washington 25

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to IT:C1:CC:3-EK

Grace G. Collins, Executrix, and
Walter D. K. Gibson, Jr., Executor,
Estate of Emily A. Gibson,
c/o Wells Fargo Bank and Union Trust Co.,
4 Montgomery Street,
San Francisco, California.

Sir and Madam:

Attention is invited to a tentative finding of the Bureau that income for the year 1941, originally taxed on your return, is apparently taxable to Estate of Walter D. K. Gibson, resulting in a proposed overassessment in your favor and a proposed deficiency against the Estate.

If you will authorize the credit of your apparent overpayment to the proposed deficiency in question, further consideration will be given, with a view to finally determining the tax liability of both parties, and your consent to credit would relieve the apparent deficiency taxpayer of the payment of the additional tax to the extent of the amount of the proposed overassessment in your favor. Pending

the receipt of such an agreement to credit, however, no overassessment is available for either credit or refund purposes.

If this adjustment is effected, and a refund found to be due you after the application of the credit, a Treasury check will be issued in settlement thereof, together with allowable interest.

In the event this adjustment is satisfactory to you, it is requested that you sign the enclosed consent to credit and return it to this office, for the attention of IT:C1:CC:3-EK.

By direction of the Deputy Commissioner:

Respectfully,

/s/ T. C. ATKESON,

Head of Division.

Enclosure:

Consent to Credit.

493M

Consent to Credit

IT:C1:CC:3-EK

We, Grace C. Collins, Executrix, and Walter D. K. Gibson, Jr., Executor, Estate of Emily A. Gibson, c/o Wells Fargo Bank and Union Trust Company, 4 Montgomery Street, San Francisco, California, do hereby authorize the Commissioner of Internal Revenue to credit an overpayment of the Estate's income taxes in the amount of \$7,359.84 for

the year 1941 to additional taxes in the amount of \$9,161.19 for the year 1941.

We, the Executrix and Executor of the above-named Estate, also hereby certify that we are still legally acting in such capacity.

.....,
Executrix.

.....,
Executor.

EXHIBIT No. 6

June 6, 1945.

Wells Fargo Bank & Union Trust Co.,
Market at Montgomery Street,
San Francisco, California.

Attention: Mr. H. G. King.

Re: Estate of Walter D. K. Gibson, Dec'd.

Gentlemen:

We are handing you, herewith, the authorization by the Executors of the will of Emily A. Gibson, deceased, to the application of the refund owing to that estate on account of 1941 income taxes to the deficiency income tax owing for that year by the estate of Walter D. K. Gibson, deceased. The use of this document is conditioned upon the transfer out of the estate of Walter D. K. Gibson, deceased, to the estate of Emily A. Gibson, of securities equal

in value to the actual amount of the credit applied to the discharge of the deficiency tax owing by the Walter D. K. Gibson estate, including any interest so applied, such securities to be evaluated as at the date of the application of said credit.

It is our understanding that the balance of the deficiency tax owing by the estate of Walter D. K. Gibson, deceased, will be paid out of the proceeds of the sale of securities held in the tax reserve for that purpose or in part by such proceeds and in part by cash contributions to be made by the persons interested in said tax reserve, in the proportions in which they are interested therein.

In this connection we refer to our recent letter stating that Mr. Walter D. K. Gibson, Jr., finds it inconvenient at this time to make any cash contribution toward this tax and that so far as he is concerned the sale of fractional and odd lot shares of stock will be proper.

Yours very truly,

MORRISON, HOHFELD, FOERSTER, SHU-
MAN & CLARK,

By

WTF:em

Enclosure

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the Stipulation of Facts heretofore filed in the above-entitled case shall be amended in the following respects:

1. Paragraph 21 of said Stipulation of Facts is hereby stricken and in its place the following paragraph is inserted:

21. If the judgment prayed for herein is granted, the refund thereby payable to plaintiff will be distributed in accordance with the decree of final distribution of Walter's Estate dated August 26, 1941, set forth in part in Exhibit 3 attached hereto.

2. Paragraph 22 of said Stipulation of Facts is hereby stricken and in its place the following paragraph is inserted:

22. In summary form, a distribution according to the terms of said decree of final distribution would be apportioned as follows:

(a) One-half in trust to Crocker First National Bank of San Francisco as trustee under the trust created by decedent's wife described in paragraph 3 hereinabove and set forth in part in Exhibit 4 attached hereto. Under the terms of this trust, the corpus is divided into two parts: Trust Estate No. One and Trust Estate No. Two.

(1) Under Trust Estate No. One the net income is payable to Grace Morris (now Grace Collins) during her lifetime. Grace Morris (Collins) has the power to appoint the trust property at her death to her surviving spouse or his descendants, or to her descendants, or to the descendants of decedent's wife (Emily A. Gibson), or to the spouses of the aforementioned descendants. If she does not exercise her power, the trust property at her death goes to her issue, or if no issue survive her, then the property shall become a part of Trust Estate No. Two. If, in the opinion of the trustees, the income from the trust shall become insufficient for the proper support, maintenance and care of Grace Morris (Collins), the trustee may pay to her from corpus such amounts, in its sole discretion, as are necessary for her care, maintenance and support, provided that such amounts shall not exceed \$5,000 per year. Since reaching the age of fifty-five (June 16, 1949), Grace Morris (Collins) has the power to invade the corpus to the extent of \$10,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

(2) Under Trust Estate No. Two the net income is payable to Walter D. K. Gibson, Jr., during his lifetime. Walter D. K. Gibson, Jr., has the power to appoint the trust property at his death to his surviving spouse or her de-

scendants, or to his descendants, or to the descendants of decedent's wife (Emily A. Gibson), or to the spouses of the aforementioned descendants. If he does not exercise his power, the trust property at his death goes to his issue, or if no issue survive him, then the property shall become a part of Trust Estate No. One. If, in the opinion of the trustee, the income from the trust shall become insufficient for the proper support, maintenance and care of Walter D. K. Gibson, Jr., the trustee may pay to him from corpus such amounts, in its sole discretion, as are necessary for his care, maintenance and support, provided that such amounts shall not exceed \$5,000 per year. After reaching the age of fifty-five (June 16, 1958), Walter D. K. Gibson, Jr., has the power to invade the corpus to the extent of \$10,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

(b) One-eighth outright to Walter D. K. Gibson, Jr.

(c) On-eighth in trust to Joanne Gibson, the granddaughter of decedent, net income payable to her annually. The trust to terminate and the corpus to be paid over to her when she reaches thirty years of age (February 23, 1959). If Joanne Gibson fails to attain such age, and Walter D. K. Gibson, Jr., survives her, corpus

over to him free of trust on her death. If Joanne Gibson should not reach thirty years of age, and Walter D. K. Gibson, Jr., predeceases her, corpus over to Grace Collins on the death of Joanne Gibson. In such event, the trust described in subdivision (d) below shall also terminate on Joanne Gibson's death, and the corpus shall be paid over to Grace Collins free of trust.

(d) One-fourth in trust to Grace Collins, net income payable to her during her lifetime. Upon her death, one-half of the corpus of said trust over to Walter D. K. Gibson, Jr., free of trust, and the remaining one-half of said corpus shall become, if Joanne Gibson be then living, part of the trust described in subdivision (c) above, or shall go to Joanne Gibson free of trust, as the case may be, according to the terms of subdivision (c) above. If Grace Collins becomes a widow at any time, the trust described in this subdivision (d) to terminate and the corpus to be paid over to her free of trust. Grace Collins has the power to invade the corpus to the extent of \$5,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

Dated: June 7, 1955.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER, HOLLOWAY, SHU-
MAN & CLARK,

Attorneys for Plaintiff.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for
Defendant.

[Endorsed]: Filed June 6, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

The action is one brought under Section 1346(a) (1) Title 28 U.S.C. for the refund of federal income taxes alleged to be erroneously assessed and collected.

The essential facts are not in dispute and have been the subject of stipulation: The taxpayer is the executor of the Last Will and Testament of Walter Gibson, who died on December 21, 1938. His estate was in the course of administration until August 26, 1941. Under the terms of his Last Will his property was placed in trust. His wife was named as the income beneficiary. The terms of the trust are not immediately important.

His Last Will, among other things, stated that its provisions were conditioned on his wife's waiving

her right to take one-half of their community property. Such a waiver was executed by his wife contemporaneously with the execution of the will.

The Will also gave her the power to withdraw one-half of the amount of the corpus of the trust for any purpose she might desire. This power was exercised by the wife when she assigned to the Crocker First National Bank as trustee one-half of the corpus of the trust established by the decedent. This property was distributed to the Crocker Bank under the Decree of Final Distribution of decedent's estate.

For the period January 1, 1941, through August 26, 1941, one-half of the income attributable to the property subject to administration in the husband's estate was returned by the taxpayer for purposes of federal income tax; the other half was reported on a return filed by the estate of the wife, Emily, she having died on November 24, 1941. A deficiency was proposed against the estate of Walter, the husband, on the ground that the entire income for that period was taxable to him. Concurrently, an overassessment was proposed with respect to the tax paid by the estate of the wife, Emily. By agreement between the parties the deficiency assessed against the husband's estate was satisfied by setting off against it the overassessment in favor of the estate of the wife and the balance was paid in cash. The wife's estate was reimbursed for the use of this certificate of overassessment. That amount was charged by the husband's estate to his heirs.

Plaintiff taxpayer, executor of the Last Will of Walter Gibson, filed a claim for refund of income taxes on the ground that for the period in question only one-half of the income was chargeable to his estate, the other half being chargeable to the estate of Emily Gibson. The government allowed this claim in the amount of \$9,362.58. Such refundable sum was reduced by the amount which thereby became due from the estate of Emily Gibson. The government paid the balance to the taxpayer. In this suit plaintiff seeks to recover that part of the amount of its claim for refund which was not refunded in cash, i.e., \$7,100.35.

The foregoing statement of facts is sufficient to focus attention upon the basic legal question involved which centers around the case of *Bishop v. Commissioner*, 152 F. 2d 389 (9th Cir.). In the *Bishop* case the taxpayer and his wife, California residents throughout their married life, had present, existing and equal rights in the community property. During the administration of the estate of the husband half of the income was reported by the estate and half by the widow. The Commissioner sought to tax all the income as that of the estate. The Court of Appeals held that the widow, being the owner of a one-half interest in the community property, owned one-half of the income therefrom. Therefore the estate, it was held, could not be taxed on more than one-half.

The primary distinction between *Bishop* and the case at bar is apparent. The decedent, Walter Gib-

son, made and executed a Will in which he purported to dispose of the entire community property. The Will recited that it was conditioned on the assumption that his wife, Emily Gibson, would waive her community property rights in the estate and accept the provisions of the Will. The wife, according to the stipulated facts, agreed to take according to the Will and waived community property rights.

The election engaged in by the wife, Emily, is binding and enforceable under California law. *Flanagan v. Capital National Bank*, 213 C. 664; *Security First National Bank v. Stack*, 32 C. A. 2d 586. There is no contention urged that the husband took advantage of his wife or that there was any overreaching or element of estoppel. Upon the husband's death, in view of this election, the entire community property became the estate of the husband. The test or criterion of ownership referred to in the Bishop case is not present. The widow's relationship to the estate was that of a beneficiary.

In *Flanagan v. Capital National Bank*, *supra*, in discussing a so-called "waiver," the court said:

"The 'waiver' was in fact a contract by the terms of which plaintiff accepted certain devises and bequests under the will in lieu of any rights she might have in any community property. Such an agreement is clearly supported by consideration and is binding upon the plaintiff * * *"

Pacific National Bank 40 B.T.A. 128, and *Coffman Dobson Bank*, 20 B.T.A. 890, relied on by

plaintiff, are beside the point and involve principles of estate tax rather than income tax. These cases hold that community property, though administered by the estate of the first spouse to die, is subject to an estate tax only on the one-half properly attributable to the decedent. They do not rule that a unit created by the Will of the decedent under a valid election of one of the spouses, may be considered thereafter as a community interest and divisible for income tax purposes during the period of probate administration.

The contention is also advanced by plaintiff that because the Will gave the wife the right to withdraw up to 50% of the trust, consequently she had the right to revoke her agreement at any time and withdraw her consideration. It is sufficient answer to this contention to say that under no circumstances could the wife obtain any ownership or control until a distribution was effected on the estate of her husband.

The waiver executed by Emily was binding upon the parties and under the circumstances of the case there is no reason why this Court should not give recognition to the laws of the State of California, permitting a husband and wife by their contract to change the character of the property acquired by them.

In *O'Bryan v. Commissioner*, 148 F. 2d 456, our Court of Appeals said:

“However, California law, Civil Code Calif., §§ 158, 159, permits a husband and wife by their

contract to change the character of property thereafter acquired from community to separate, and such an agreement has been held effective to alter the nature of the property for income tax purposes." (p. 458.)

Likewise, in the case at bar, the Court finds that Emily Gibson's waiver changed the character of the community interest upon the death of her husband and that the executor of the Last Will of Walter Gibson was liable for the full amount of taxes assessed against it. In view of the foregoing ruling it becomes unnecessary to consider the secondary defense urged by the government wherein the doctrine of equitable recoupment is urged.

The action must be dismissed as against the defendant United States of America.

During the course of the oral arguments before this Court the government proposed a counterclaim. Section 6532(b) of the Internal Revenue Code of 1954 (26 U.S.C.A. 6532[b]) bars the filing of a claim for collection of a refund unless the claim is instituted within two years after the refund is made. In the instant case the two-year statute of limitations expired just one day after the plaintiff commenced this action on April 11, 1952.

The government presented its leave to file a counterclaim only at the conclusion of the trial of the case in June of 1955, some five years after making the erroneous refund. Rule 13(f) permits a pleader to set up a counterclaim when he fails to

do so through oversight, inadvertence or excusable neglect or when justice so requires. The government was aware of its refund for the full statutory period and yet failed to act by demanding its return until the trial itself. Under these circumstances, the government's excuse for the delay is not encompassed in the several grounds set forth in Rule 13 F.R.C.P. Defendant's delay constitutes laches.

It is also to be noted that this case was tried upon a stipulation of facts. Under the stipulation, agreed upon by the defendant, the amount of tax in dispute exclusive of interest, was fixed at \$7,100.35. (Stipulation 24.) It would be unfair for the defendant, particularly during the closing stages of the litigation, to seek an additional \$2,000 after agreeing that the amount in dispute is \$7,100.35.

Under the circumstances, the defendant's motion for leave to file the counterclaim is denied.

Findings may be prepared in accordance with the foregoing and Judgment entered thereon.

Dated: September 23, 1955.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed September 23, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on June 7, 1955, before the Court sitting without a jury, Honorable George B. Harris, United States District Judge, presiding. Clarence E. Musto, Esq. and Franklin C. Latcham, Esq., appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by George A. Blackstone, Esq., Assistant United States Attorney, appeared for defendant. Evidence having been introduced and the matter having been briefed, the Court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. The above-entitled action was brought by plaintiff to recover federal income taxes in the sum of \$7,100.35 with interest thereon from date of payment.

2. The allegations of paragraphs 2, 3, 7 and 8 of the complaint are true. The allegations of paragraph 1 of the complaint are true, except that portion of last sentence thereof which alleges that said estate was composed entirely of community property. The allegations of paragraph 4 of the complaint are true, except that portion of the last sentence thereof which alleges that income for the period January 1, 1941, to August 26, 1941, was attributable to com-

munity property. The allegations of paragraph 5 of the complaint are true, except that \$8,531.90 of said additional tax was satisfied on July 11, 1945, by crediting an overassessment due Emily A. Gibson, deceased, in the amount of \$7,359.84 plus interest of \$1,172.06.

3. The Last Will and Testament of Walter D. K. Gibson, executed on August 31, 1937, left all of his property in trust, and provided that it was conditioned on his wife, Emily A. Gibson, waiving her right to take one-half of the community property. Emily A. Gibson executed an election agreement to take under the will on August 31, 1937.

4. On May 8, 1941, pursuant to a power given her under the will, Emily A. Gibson withdrew fifty per cent of the corpus of the Estate of Walter D. K. Gibson, deceased, and assigned such property to the Crocker First National Bank of San Francisco to hold as trustee under a trust agreement. The property so assigned was distributed to said trustee under the decree of final distribution of said estate on August 26, 1941.

5. At the date of the death of Walter D. K. Gibson on December 21, 1938, all the property owned by him, and all the property owned by his wife, was community property in which during the continuance of the marriage relationship they had present, existing and equal interests. The estate of said decedent was composed entirely of the property referred to in this paragraph, and said estate was

distributed in accordance with the provisions of decedent's will.

6. On June 30, 1947, plaintiff filed a claim for refund of taxes in the sum of \$9,161.19 for said estate for the year 1941. On April 12, 1950, said claim was allowed by the Commissioner of Internal Revenue, who reduced the amount payable by \$7,100.35, the sum of a proposed deficiency in the tax due from Emily A. Gibson, deceased. The balance of \$2,060.84, plus interest of \$347.83 was paid to plaintiff on April 12, 1950.

7. On April 13, 1950, the Commissioner notified plaintiff that the claim for refund was disallowed to the extent not previously allowed by the certificate of overassessment of April 12, 1950.

8. On June 7, 1955, during the course of the trial herein, the defendant made an oral motion for permission to file a counterclaim for \$2,408.67, the amount of principal and interest paid to plaintiff on April 12, 1950. On July 29, 1955, as part of its brief, defendant renewed this motion and attached a proposed amendment to its answer setting forth such counterclaim.

Conclusions of Law

1. The election by Emily A. Gibson to waive her community property right and take according to the will changed the character of the community interest upon the death of her husband and the entire community property became the estate of the husband.

2. The Commissioner properly determined in accordance with law that the executor was liable for income taxes based upon the entire net income of the Estate of Walter D. K. Gibson, deceased.

3. The Government's counterclaim is barred by the two year statute of limitations prescribed in Section 6532(b) of the Internal Revenue Code of 1954 (26 U.S.C.A. 6532(b)), and by laches.

4. Defendant is entitled to judgment herein that plaintiff recover nothing and dismissing the complaint.

Dated: Nov. 23, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

Affidavit of Mail attached.

Lodged October 24, 1955.

[Endorsed]: Filed November 23, 1955.

In the United States District Court, for the Northern District of California, Southern Division

Civil No. 31436

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on June 7, 1955, before the Court sitting without a jury, Honorable George B. Harris, United States District Judge, presiding. Clarence E. Musto, Esq. and Franklin C. Latcham, Esq., appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by George A. Blackstone, Esq., Assistant United States Attorney, appeared for defendant. Evidence having been introduced and the cause submitted for decision upon briefs and the Court having made its findings of fact and conclusions of law,

Now Therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's complaint and cause of action therein be and the same is hereby dismissed.

/s/ GEORGE B. HARRIS,

United States District Judge.

Dated: Nov. 23, 1955.

Affidavit of Service by Mail attached.

Lodged October 24, 1955.

[Endorsed]: Filed November 23, 1955.

Entered November 25, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT
OF APPEALS

It Is Further Ordered, Adjudged and Decreed that the motion of the defendant to file a counter-claim herein be and the same is hereby denied.

Notice Is Hereby Given that Wells Fargo Bank & Union Trust Co., Executor of the Will of Walter D. K. Gibson, Deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment dismissing plaintiff's complaint entered in this action on November 25, 1955.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER, HOL-
LOWAY, SHUMAN & CLARK,

Attorneys for Plaintiff-Appellant Wells Fargo
Bank & Union Trust Co., Executor of the Will
of Walter D. K. Gibson, Deceased.

[Endorsed]: Filed January 23, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by counsel for the parties thereto:

Excerpt From Docket Entries.

Complaint With Exhibits Attached.

Answer of Defendant.

Interrogatories by Defendant to Plaintiff.

Answer of Plaintiff to Interrogatories by Defendant.

Stipulation of Facts With Attached Exhibits.

Supplemental Stipulation of Facts.

Jurisdictional Statement and Statement of Facts.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal by Defendant.

Notice of Appeal by Plaintiff.

Appeal Bond.

Appellant's Designation of Record on Appeal
(Wells Fargo).

Reporter's Transcript of Proceedings of
June 7, 1955.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
23rd day of February, 1956.

[Seal] C. W. CALBREATH,
Clerk.

[Endorsed]: No. 15046. United States Court of
Appeals for the Ninth Circuit, Wells Fargo Bank
& Union Trust Co., Executor of the Will of Walter
D. K. Gibson, Deceased, Appellant, vs. United
States of America, Appellee. Transcript of Record.
Appeal From the United States District Court for
the Northern District of California, Southern Di-
vision.

Filed: February 23, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15046

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

The points upon which appellant will rely on this appeal are:

The District Court erred:

1. In holding that the election by Emily A. Gibson to waive her community property right and take according to the will changed the character of the community interest upon the death of her husband and the entire community property became the estate of the husband.

2. In holding that the Commissioner of Internal Revenue properly determined in accordance with law that the Executor of the Estate of Walter D. K. Gibson, deceased, was liable for income taxes based upon the entire net income of the Estate for the period from January 1, 1941, to August 26, 1941.

3. In failing to hold upon the facts and the law that one-half of the net income received by the Estate of Walter D. K. Gibson, deceased, for the period from January 1, 1941, to August 26, 1941, was taxable to the Executor of said Estate, and that one-half of the net income was taxable to Emily A. Gibson.

4. In entering judgment that the plaintiff's complaint and cause of action therein be dismissed.

Dated: March 6, 1956.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER HOL-
LOWAY, SHUMAN & CLARK,
Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed March 6, 1956.

Date	Description	Amount	Balance	Page
1890				
Jan 1	Balance forward	100.00	100.00	1
Jan 5	John Doe	50.00	50.00	2
Jan 10	John Doe	50.00	0.00	3
Jan 15	John Doe	50.00	50.00	4
Jan 20	John Doe	50.00	0.00	5
Jan 25	John Doe	50.00	50.00	6
Jan 30	John Doe	50.00	0.00	7
Feb 1	John Doe	50.00	50.00	8
Feb 5	John Doe	50.00	0.00	9
Feb 10	John Doe	50.00	50.00	10
Feb 15	John Doe	50.00	0.00	11
Feb 20	John Doe	50.00	50.00	12
Feb 25	John Doe	50.00	0.00	13
Feb 30	John Doe	50.00	50.00	14
Mar 1	John Doe	50.00	0.00	15
Mar 5	John Doe	50.00	50.00	16
Mar 10	John Doe	50.00	0.00	17
Mar 15	John Doe	50.00	50.00	18
Mar 20	John Doe	50.00	0.00	19
Mar 25	John Doe	50.00	50.00	20
Mar 30	John Doe	50.00	0.00	21
Apr 1	John Doe	50.00	50.00	22
Apr 5	John Doe	50.00	0.00	23
Apr 10	John Doe	50.00	50.00	24
Apr 15	John Doe	50.00	0.00	25
Apr 20	John Doe	50.00	50.00	26
Apr 25	John Doe	50.00	0.00	27
Apr 30	John Doe	50.00	50.00	28
May 1	John Doe	50.00	0.00	29
May 5	John Doe	50.00	50.00	30
May 10	John Doe	50.00	0.00	31
May 15	John Doe	50.00	50.00	32
May 20	John Doe	50.00	0.00	33
May 25	John Doe	50.00	50.00	34
May 30	John Doe	50.00	0.00	35
Jun 1	John Doe	50.00	50.00	36
Jun 5	John Doe	50.00	0.00	37
Jun 10	John Doe	50.00	50.00	38
Jun 15	John Doe	50.00	0.00	39
Jun 20	John Doe	50.00	50.00	40
Jun 25	John Doe	50.00	0.00	41
Jun 30	John Doe	50.00	50.00	42
Jul 1	John Doe	50.00	0.00	43
Jul 5	John Doe	50.00	50.00	44
Jul 10	John Doe	50.00	0.00	45
Jul 15	John Doe	50.00	50.00	46
Jul 20	John Doe	50.00	0.00	47
Jul 25	John Doe	50.00	50.00	48
Jul 30	John Doe	50.00	0.00	49
Aug 1	John Doe	50.00	50.00	50
Aug 5	John Doe	50.00	0.00	51
Aug 10	John Doe	50.00	50.00	52
Aug 15	John Doe	50.00	0.00	53
Aug 20	John Doe	50.00	50.00	54
Aug 25	John Doe	50.00	0.00	55
Aug 30	John Doe	50.00	50.00	56
Sep 1	John Doe	50.00	0.00	57
Sep 5	John Doe	50.00	50.00	58
Sep 10	John Doe	50.00	0.00	59
Sep 15	John Doe	50.00	50.00	60
Sep 20	John Doe	50.00	0.00	61
Sep 25	John Doe	50.00	50.00	62
Sep 30	John Doe	50.00	0.00	63
Oct 1	John Doe	50.00	50.00	64
Oct 5	John Doe	50.00	0.00	65
Oct 10	John Doe	50.00	50.00	66
Oct 15	John Doe	50.00	0.00	67
Oct 20	John Doe	50.00	50.00	68
Oct 25	John Doe	50.00	0.00	69
Oct 30	John Doe	50.00	50.00	70
Nov 1	John Doe	50.00	0.00	71
Nov 5	John Doe	50.00	50.00	72
Nov 10	John Doe	50.00	0.00	73
Nov 15	John Doe	50.00	50.00	74
Nov 20	John Doe	50.00	0.00	75
Nov 25	John Doe	50.00	50.00	76
Nov 30	John Doe	50.00	0.00	77
Dec 1	John Doe	50.00	50.00	78
Dec 5	John Doe	50.00	0.00	79
Dec 10	John Doe	50.00	50.00	80
Dec 15	John Doe	50.00	0.00	81
Dec 20	John Doe	50.00	50.00	82
Dec 25	John Doe	50.00	0.00	83
Dec 30	John Doe	50.00	50.00	84
Total		1000.00	1000.00	